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No. 84-1226

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

ROBERT E. BADHAM, et al.,
Petitioners,

v.

THE SECRETARY OF THE STATE OF CALIFORNIA, et al.,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the three-judge district court abused its discretion in this reapportionment case by refusing to lift its abstention order when (1) the court of appeals had unanimously affirmed the order and petitioners had not sought review in this Court, and (2) the district court properly found that petitioners had not made a good faith effort to resolve state law issues in the state courts.

2. Whether this Court should review the refusal to lift an abstention order when trial on the state law issues is set for May 8, 1985 in the Los Angeles Superior Court.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case contains numerous inaccuracies and misleading statements.[1] Many of these misstatements, however, are irrelevant to the abstention issue, which is the only question properly before the Court on the Petition for Certiorari.

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[1] In at least one instance, petitioners' factual statements are inconsistent and inaccurate on their face. They say that the congressional districting plan was passed in each house on a party-line vote. Cert. Pet. at 5. That much is true. Petitioners then state that the voting margins in the two houses were the two-thirds necessary to preclude a popular referendum. *Id.* This statement is utterly false. No party has a two-thirds majority of California's legislative houses. A referendum to the California electorate was plainly available on this plan. Cal.Const. Art. II. Petitioners, however, declined to take their case to the people and sought judicial intervention instead.

Therefore, respondent Assembly of the State of California will not in this response attempt to correct the record on all of these matters. Rather, we here present only those facts pertinent to this Court's consideration of the abstention issues raised by the Petition for Certiorari.

On March 8, 1983, petitioners filed their initial complaint challenging California's Congressional reapportionment plan on the grounds that it did not meet federal one person one vote standards. Petitioners further alleged that the plan was a "political gerrymander" and that it violated three separate provisions of the California Constitution: (1) that it was not "essentially different" from a plan previously disapproved in a referendum, (2) that it did not meet state reapportionment criteria, such as contiguity of districts, and (3) that it was passed in violation of legislative procedures required by the California Constitution. *See* App. Cert. Pet. at 6a, 44a.

On March 31, 1983, petitioners added a fourth state law cause of action, claiming that corrections to the plan implemented by the Secretary of State violated California law. *See* App. Cert. Pet. at 37a-38a. Petitioners conceded that the plan as corrected had an overall population deviation of .0538%, but argued that the district court should find the corrections invalid and then hold the uncorrected plan unconstitutional because it would then contain deviations of 3.283%. *See* Cert. Pet. 6, n.4; App. Cert. Pet. at 6a, 37a.

On April 26, 1983, the California Democratic Congressional Delegation filed an action in Los Angeles Superior Court for a declaratory judgment that the plan was properly corrected and violated no other state court requirements. *See* App. Cert. Pet. at 7a.

On June 20, 1983, the three-judge district court abstained on the basis of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). It found that reapportionment was a sensitive area of state policy. App. Cert. Pet. at 39a. And it found that the interpretation of the four state law claims presented was in doubt. *Id.* at 41a-44a. The primary state law issue was whether the Secretary of State had the authority, pursuant to California

Elections Code Section 30000 and previous California precedent, to correct errors in the bill as chaptered. The court noted the parties' widely different interpretations of Section 30000, which had never been construed by the California courts.[2] *Id.* at 43a.

Finally, the district court found abstention appropriate because

> . . . In this case, an issue of state law presents a threshold question which will materially alter the federal constitutional question presented. The plaintiffs have claimed in Count VII of their complaint that the "technical corrections" implemented by the Secretary of State violate the state constitution. A decision on this state law issue will determine whether the three-judge court reviews the reapportionment plan with or without the challenged changes. With the changes the reapportionment plan, according to defendants, has a population deviation of only .0538%—a deviation percentage below that which the Supreme Court has found constitutional. The unchanged, or original plan, in contrast, is more in doubt. Its population deviation of 3.283% comes closer to deviations found constitutionally violative.
>
> App. Cert. Pet. at 40a-41a (footnotes omitted).

On June 28, 1983, after previously receiving extensions of time, the petitioners demurred to the state court complaint and moved for change of venue. The demurrer was overruled except as to the Republican National Committee and the motion for change of venue was denied. The petitioners did not file an answer until September 16, 1983. *See* App. Cert. Pet. at 8a.

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[2] The district court held that the application of Article IV, sec. 8 of the California Constitution (three-reading legislative rule) and of recently added Article XXI (new reapportionment requirements) was also in doubt. It also held that the determination of whether the new plan was "essentially different" from the old was a state law issue of first impression. App. Cert. Pet. at 44a.

On August 10, 1983, the Ninth Circuit heard oral argument on petitioners' appeal and emergency petition for writ of mandamus from the district court's abstention order.

On August 30, 1983, while the Ninth Circuit was considering the appeal, petitioners filed an *amicus curiae* brief in the California Supreme Court in the case of *Legislature v. Deukmejian*, 34 Cal.3d 658 (1983). In that case petitioners specifically asked the California Supreme Court *not* to decide the state law issues which were the basis of the district court's abstention order.[3]

On September 26, 1983, the Ninth Circuit unanimously affirmed the abstention order. *Badham v. United States District Court for the Northern District of California*, 721 F.2d 1170 (9th Cir. 1983), App. Cert. Pet. at 27a-35a.

On September 30, 1983, petitioners made their first attempt to obtain a state court adjudication. They filed with the Supreme Court of California a petition for writ of mandate tendering the state law issues. In that petition they insisted that "the matter be briefed, argued and decided no later than November 1, 1983;" that is, within thirty-one days. *See* App. Cert. Pet. at 8a.

On October 11, 1983, petitioners requested rehearing of the Ninth Circuit decision affirming abstention. *Id.*

On October 27, 1983, the California Supreme Court denied the petition for writ of mandate for three reasons:

> (1) The petition was premature because petitioners' request for rehearing was pending before the Ninth Circuit.
>
> (2) Petitioners' delay between June 10, 1983 and September 30, 1983 in seeking relief in the Supreme Court prevented resolution of disputed factual claims by the November 1, 1983 date specified by petitioners.
>
> (3) The extraordinary relief requested was inappropriate because time constraints might well necessitate use of the

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[3] A copy of petitioners' *amicus curiae* brief in that case was attached as Appendix A to the Assembly's February 12, 1985 response to petitioners' motion to expedite consideration in this Court.

challenged congressional districts for the 1984 elections in any event.

Badham v. Eu, Cal. S.Ct. No. SF24638, Slip Op. (App. Cert. Pet. at 25a-26a).

The denial was "without prejudice to the filing of a subsequent petition seeking relief in an appropriate court at such time as the abstention order becomes final." *Id.* at 26a.

On December 12, 1983, the Ninth Circuit denied the petition for rehearing, noting that petitioners were free to return to the district court in the event of undue delays in the state court. App. Cert. Pet. at 23a-24a.

On that same date, December 12, 1983, petitioners returned to the district court with an application to reassert jurisdiction, a motion for leave to file a second amended complaint, and other motions. *See* App. Cert. Pet. at 9a-10a. They declined the California Supreme Court's invitation to seek resolution of the state law issues in an appropriate state court. Instead the proposed second amended complaint would simply have dropped the pendent state claims from the federal suit. *See id.* at 10a.

On March 11, 1984, the time to file a petition for certiorari to the Ninth Circuit for review of the decision affirming the district court's abstention order passed without action by petitioners.

On June 19, 1984, the district court, one judge dissenting, declined to lift its abstention order and accordingly denied all other motions. App. Cert. Pet. at 14a. After full briefing and argument, the district court specifically found that petitioners had not made a good faith effort to resolve the state law issues as required by the Ninth Circuit's affirmance: "[W]e hold that plaintiffs have not made a good faith effort to obtain a disposition of the state law issues in state court." *Id.*

Citing *Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (*per curiam*) the district court rejected petitioners' argument that their willingness to drop the state claims somehow changed the *Pullman* analysis:

> Abstention is not based on the parties' artful pleading, it rests on the much loftier considerations of comity and sound judicial administration.
>
> *Id.* at 14a.

The district court noted that at the hearing, petitioners "conceded that even when they filed their December application [to reassert jurisdiction], it was already too late to formulate a new plan for the 1984 Congressional elections" and that "[a]ll parties have agreed that relief, if any, could be effective only for the 1986 elections." *Id.*

In order to "ensure that the state proceedings will not be unnecessarily delayed" the court directed the parties to file monthly progress reports with the federal court, identifying all action in the state courts. *Id.* at 15a.

On November 1, 1984, the Ninth Circuit unanimously affirmed the district court. App. Cert. Pet. at 1a-3a.

On January 18, 1985, petitioners filed a motion in the Los Angeles Superior Court to advance trial and for precedence on the calendar. The motion was granted on February 8, 1985 and trial was set on the state law issues for May 8, 1985.

On January 30, 1985, the ninetieth day after the second Ninth Circuit decision affirming the district court, petitioners filed the pending petition for certiorari. The petition was served by ordinary first-class mail from Washington D.C. and was received by the Assembly's attorneys on February 4, 1985. On February 8, 1985, petitioners filed their motion to expedite, which this Court denied by Order entered February 19, 1985.

SUMMARY OF ARGUMENT

The district court's original unanimous decision to abstain was indisputably correct. Each of the four state law issues raised by petitioners in their complaint could either substantially alter or moot the federal claims. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). In its unanimous opinion upholding the district court, the Ninth Circuit gave particular attention to the special problems of voting rights cases. And the petitioners

accepted the decision of the Ninth Circuit by failing to petition this Court for certiorari.

Petitioners subsequent offer to abandon their state law claims did not require the district court to lift the abstention order. Abstention depends on whether dispositive state law grounds exist, not on whether petitioners have raised them. *See Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (*per curiam*). The state law issues were still present; they were still doubtful; and their resolution could still materially alter or moot the federal claims.

The courts below correctly found that petitioners had not in good faith sought state court adjudication and that sufficient time remained before the 1986 elections for the resolution of state law issues and return to the district court if necessary. App. Cert. Pet. at 14a-15a, 2a-3a. The district court's order requiring monthly status reports demonstrates that court's commitment to assuring timely relief. *Id.* at 15a.

Petitioners' claim of a conflict among the circuits is illusory. The cases from other circuits on which petitioners rely did not present doubtful and potentially dispositive state law issues and for the most part did not discuss abstention. *See* cases cited in Petition for Certiorari at pp. 15-16, n.10 and 11. *See also Bandemer v. Davis*, Nos. IP 82-56-C, IP 82-164-C (S.D.Ind. Dec. 13, 1984), *app. pndg.*, No. 85-1244 (abstention denied without discussion). Those that did deal with abstention are easily distinguished. *See Ryan v. State Board of Education of State of Illinois*, 661 F.2d 1130 (7th Cir. 1981); *Lister v. Lucey*, 575 F.2d 1325 (7th Cir.), *cert. denied*, 439 U.S. 865 (1978); *414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974). The facts of this case uniquely call for abstention.

Trial of the state law issues is now set for May 8, 1985 in Los Angeles Superior Court. Even if this Court were to grant the petition for certiorari, petitioners will in all likelihood have a decision on the state law issues by the time this Court calendars the matter for argument.

ARGUMENT

Petitioners advance several reasons for granting the writ. *See* Cert. Pet. at 9 and section headings. These various grounds can, we think, be safely summarized as a claim that because some courts in other circuits have not abstained in voting rights cases, the district court here should have refused to abstain. The Ninth Circuit's decision, petitioners say, therefore creates a conflict which should be resolved by this Court.

But abstention cases are to be decided on the facts relevant to each case. Petitioners mischaracterize the decisions in other circuits and ignore the unique facts of this case.

I

THIS IS A CLASSIC CASE FOR ABSTENTION

In a one person one vote case, the crucial facts are statistics as to population deviations among the districts. If the corrections to the plan implemented by the Secretary of State are valid under California law, then the deviations in California's congressional plan are so small as to be utterly irrelevant. In that event, there would be little to be said against the plan. On the other hand, if the corrections are invalid, the resulting population deviations would surely strengthen a one person one vote claim and dramatically affect judicial considerations.

The state law corrections issue is new; its resolution would substantially modify the facts on which adjudication of the federal claim would be based. And, the area of state law involved is of utmost sensitivity: whether and under what circumstances the California Secretary of State may correct reapportionment legislation.

The presence of three additional state law issues whose resolution would entirely moot both the one person one vote and the gerrymandering claim makes abstention all the more appropriate.

This is a classic case for *Pullman* abstention. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).[4] Indeed, petitioners did not seek review in this Court from the Ninth Circuit's initial abstention decision.

Yet, petitioners now argue that their gerrymandering claim is so important that the federal courts should reach it immediately without waiting for state court review of the state law issues. That argument stands the abstention doctrine on its head. It is precisely the difficulty and novelty of the political gerrymandering claim, as well as its implications for federal-state relations, that counselled the district court not to reach for this issue when potentially dispositive state law issues remained.

II

PETITIONERS DID NOT MAKE A GOOD FAITH EFFORT TO SECURE A STATE COURT DECISION

It is apparent that after June of 1983 petitioners' aim was not to secure invalidation of the plan on state law grounds or even on one person, one vote grounds. Their aim was to participate in making law on political gerrymandering. And while that might be a legitimate goal for these petitioners or for the Republican National Committee, the district court was under no duty to assist them when the message of *Pullman* was so clear.

In their petition for certiorari, petitioners advise this Court that the harm the district court did was that it "remitted them, effectively, to the glacial processes of the Los Angeles County Superior Court." Cert. Pet. at 8. As the Ninth Circuit had already pointed out, however, that was not so. App. Cert. Pet. at

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[4] As we discuss in Section III, when petitioners moved to drop their state law claims from the federal suit, they did not and could not alter the fact that resolution of those claims would still modify the federal issue and possibly moot the entire case. And, notwithstanding petitioners' reliance on Judge Schnacke's dissent (Cert. Pet. at 22), the mere fact that corrected districts had been used in the 1984 elections did not resolve the validity of the corrections under state law. *Compare* App. Cert. Pet. at 5a, n.1 with *id.* at 17a.

2a-3a. Moreover, when petitioners finally decided to seek a trial date in the superior court, trial was set for May 8, 1985, less than four months after petitioners filed their request.

Had petitioners moved the superior court for an expedited trial date in June of 1983, when the district court first abstained, they could have gone to trial in October of 1983.

Petitioners filed no action of their own. They sought to dimiss the action filed by the Congressional Delegation. And they specifically asked the California Supreme Court in a related case *not* to decide the state law issues which could have given them the relief they sought.

When petitioners finally filed their own petition for an extraordinary writ in the California Supreme Court, they gave that court a 31-day deadline for action. When the Court refused to act on such a short timetable, petitioners declined the court's invitation to file in another appropriate California court.[5]

The district court's holding that petitioners failed to make a good faith effort to secure a state decision on the critical and doubtful state law issues was clearly correct. The delay here was of petitioners' making. In no event can the decision to continue abstention be characterized as an abuse of discretion.

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[5] As the California Supreme Court pointed out, it appeared that election scheduling would require use of the plan in the 1984 elections in any event. App. Cert. Pet. at 25a. Moreover, none of the cases cited by petitioners as evidencing the willingness of the California Supreme Court to act quickly involved decisions on the 31-day start to finish deadline insisted upon by petitioners. *See, e.g., Assembly v. Deukmejian*, 30 Cal.3d 638, *cert. denied sub nom. Republican National Committee v. Burton*, 456 U.S. 941 (1982) (filed October, 1981, decided January 28, 1982).

III

THE CLAIMED CONFLICT WITH OTHER CIRCUITS IS ILLUSORY

In this case, four separate state law issues justified the district court's original and continued abstention. The intervening events and supposed special circumstances that petitioners advance neither made abstention an abuse of discretion nor placed the Ninth Circuit in conflict with other circuits.

A. The Offer to Abandon Pendent State Claims

Petitioners argue that by tendering a second amended complaint that did not seek relief on pendent state claims they eliminated the grounds for abstention.[6] But whether petitioners specifically alleged the state law issues or not, decision on those issues could still resolve the case without the need to reach political gerrymandering. If the Los Angeles Superior Court holds the corrections invalid, then petitioners will have a stronger one person one vote claim to bring back to the district court. And if petitioners prevail on any of their other state law grounds they will have won their case.

Petitioners cite *Ryan v. State Board of Elections of State of Illinois*, 661 F.2d 1130 (7th Cir. 1981), where, they assert, the Court of Appeals held that because the parties raised only federal claims the district court "had no authority to abstain." *Id.* at 1135, quoted in Cert. Pet. at 15. Petitioners quote only the first half of the sentence and thus gravely distort the decision in *Ryan*. The Seventh Circuit in fact held that because a three-judge court should have been convened, a single judge, acting alone, "had no authority to abstain . . . ; *only a three-judge panel could make that determination.*" 661 F.2d at 1135 (emphasis added). *Ryan* does not support petitioners' position. Neither does any other case.

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[6] As the district court noted, petitioners' proposed second amended complaint made all the same allegations; it just omitted citations to the California Constitution and statutes. App. Cert. Pet. at 10a.

The established law in other circuits, in the Ninth Circuit, and in decisions of this Court is the same: abstention is appropriate if the *Pullman* criteria are met and potentially dispositive state law issues exist even though the state law claims are not raised in the federal suit. *See Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (*per curiam*); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 840 (9th Cir. 1979); *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471, 483-85 (2nd Cir. 1976); *Muskegon Theaters, Inc. v. City of Muskegon*, 507 F.2d 199, 204 (6th Cir. 1974); *Reid v. Board of Education of City of New York*, 453 F.2d 238, 242 n.7 (2nd Cir. 1971).

Abstention is a matter of basic federal jurisprudence and sound judicial policy. Even if both parties agree not to raise abstention, the court may be under an obligation to raise the doctrine *sua sponte*. *See Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11 (1977); *United Home Rentals Inc. v. Texas Real Estate Commission*, 716 F.2d 324, 332 (5th Cir. 1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1712 (1984). The district court and the Ninth Circuit did not abuse discretion nor conflict with other circuits in applying these principles to this case.

B. The Responsiveness of the State Courts

Petitioners rely on two cases from other circuits for the proposition that after the California Supreme Court denied their petition for extraordinary relief abstention was no longer proper. *Lister v. Lucey*, 575 F.2d 1325 (7th Cir.), *cert. denied*, 439 U.S. 865 (1978) and *414 Theatre Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974) cited in Cert. Pet. at 20-21. Neither case is comparable to the situation here.

In *Lister*, the plaintiffs commenced and vigorously pursued a state court action immediately after the federal district court stayed its hand on grounds of abstention. 575 F.2d at 1329. Both the state trial court and the Wisconsin Supreme Court, however, refused to hear the merits of plaintiffs' claim on the grounds that

they had failed to exhaust state administrative procedures, procedures that all parties conceded were time consuming and burdensome. 575 F.2d at 1329-31. The Wisconsin Supreme Court admitted its inherent authority to reach the merits despite such jurisdictional impediments but declined to do so on the grounds that the issue was not of sufficient public importance. *See* 575 F.2d at 1330, 1332. The federal district court not only refused to lift its stay, it also dismissed the complaint. On these facts the Seventh Circuit held that the district court should not have continued to abstain. 575 F.2d at 1331-32. Six and one-half years after the federal action had commenced, the Seventh Circuit remanded the case to the district court for a decision on the merits.

The instant case lacks all of the features that led to the Seventh Circuit decision in *Lister*. Petitioners have not vigorously pursued state court litigation; they have not been relegated to lengthy or burdensome state administrative proceedings; the state court has not suggested that the issues lack importance; and nothing approaching the time in *Lister* has passed. The state court trial is set for May 8, 1985.

The case of *414 Theatre Corp. v. Murphy, supra,* is no more on point. That case involved *Younger* abstention, not *Pullman* abstention. There, the federal district court had initially stayed its hand " 'in the spirit of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) . . . with full awareness that denial [of a preliminary injuction] was not mandated . . . since no criminal or civil cases involving 414 were pending in the state courts . . . ' " 499 F.2d 1156 (quoting from the district court opinion). The district court reasserted jurisdiction only after the state appellate division reversed a civil injunction on procedural grounds and thereby avoided ruling on the constitutional claim. 499 F.2d at 1157. The Second Circuit affirmed the district court's decision to proceed. Here, of course, it is petitioners themselves, not the state courts that have avoided resolution of the state law issues.

C. Abstention in Voting Rights Cases

Petitioners suggest that there is a conflict among the circuits because courts in other circuits have not abstained in reapportionment cases. They further assert that under this Court's cases the initial abstention order and continued abstention were improper. They are wrong on both counts.

Petitioners' argument that abstention is improper here begins with the claim that "[f]ederal law, not state policy, sets the standard for reviewing congressional redistricting cases." Cert. Pet. at 14. But Article I, § 4 of the United States Constitution provides that in the first instance "[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[7]

Petitioners' suggestion that abstention does not apply in voting rights and reapportionment cases is frivolous. *See, e.g., Zwickler v. Koota*, 389 U.S. 241, 242, 248-52 (1967); *Harman v. Forssenius*, 380 U.S. 528, 534-36 (1965); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713, 716 n.2 (1964). *See also Scott v. Germano, supra*, 381 U.S. at 408-09.[8]

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[7] Because reapportionment is carried out by the states, federal courts are encouraged to defer to the state legislatures and state courts for action whenever possible in reapportionment matters, including those involving congressional districting. *See, e.g., Upham v. Seamon*, 456 U.S. 37, 43 (1982); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971); *White v. Weiser*, 412 U.S. 783, 794-95 (1973); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*).

[8] Petitioners rely on several of these decisions for the proposition that in cases involving fundamental rights, the mere prospect of delay forbids abstention. Cert. Pet. at 12-13. But there is no exception to the abstention doctrine for federal constitutional and civil rights cases. *See Askew v. Hargrave, supra*, 401 U.S. at 478; *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176-78 (1959). In *McNeese v. Board of Education*, 373 U.S. 668 (1963), on which petitioners rely, this Court simply held that a federal civil rights litigant need not exhaust state administrative remedies and await decision of the "same claim" in state court before obtaining federal adjudication. 373 U.S. at 672. In each of the other

Federal courts throughout the country have abstained in reapportionment actions to allow state courts to adjudicate state law issues.[9] *See, e.g., Cline v. Robb*, 548 F.Supp. 128, 133-34 (E.D.

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cases on which petitioners rely, some established element, necessary for abstention, was missing. Thus in *Baggett v. Bullitt*, 377 U.S. 360, 375-76 (1964), and *Zwickler v. Koota, supra*, 389 U.S. at 249, state court construction was unlikely to moot or modify the federal constitutional issue. In *Griffin v. School Board of Prince Edward*, 377 U.S. 218, 229 (1964), the state courts had already passed on the state law issues; and in *Harman v. Forssenius*, 380 U.S. 528, 535-36 (1965) the state statutes were clear and unambiguous and were unlikely to moot the federal claim.

[9] In support of their contrary argument, petitioners cite a series of district court reapportionment decisions. Cert. Pet. at 15-16 n.10 and 11. However, none of these reported decisions and none of the unpublished opinions that respondents have been able to locate presented a situation comparable to that which led the district court to abstain here. Indeed, in most of these cases the courts did not even discuss abstention and there were no ambiguous and potentially dispositive state law issues that would justify abstention. In *Carstens v. Lamm*, 543 F.Supp. 68, 83 n.38 (D. Colo. 1982), for example, the only reference to state law appears to be the court's use of state constitutional criteria governing state legislative plans in the course of developing a court ordered congressional plan. The court in *In re Pennsylvania Congressional Districts Reapportionment Cases*, 567 F.Supp. 1507 (M.D. Pa. 1982), found no federal constitutional violation based on alleged lack of compactness and contiguity and held that the plaintiffs' "remedy lies in the ballot box, not in a federal courthouse." 567 F.Supp. at 1517. In *Flateau v. Anderson*, 537 F.Supp. 257, 262 (S.D.N.Y.) (*per curiam*), *app. dismissed*, 458 U.S. 1123 (1982), the court simply held that federal constitutional requirements superseded a provision of the New York Constitution allowing the legislature six years after the decennial census to enact a reapportionment plan. The state law claim in *Travis v. King*, 552 F.Supp. 554, 556 n.4 (D. Ha. 1982) apparently was identical to the federal one person one vote issue. And while the court in *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F.Supp. 630 (E.D. Wis. 1982) did deny the governor's request that it abstain in order to allow the Wisconsin Supreme Court to act on his original petition regarding reapportionment, there is no indication in that case that the governor's petition raised any state law issues. 543 F.Supp. at 632. In *Ryan v. State Board of Elections of Illinois*, 661 F.2d 1130 (7th Cir.

Va. 1982); *Bryant v. Whitcomb*, 419 F.Supp. 1290, 1297-99 (S.D. Ind. 1970); *Grivetti v. Illinois State Electoral Board*, 335 F.Supp. 779, 785-86 (N.D. Ill. 1971), *aff'd mem.*, 406 U.S. 913 (1972); *Ince v. Rockefeller*, 290 F.Supp. 878 (S.D.N.Y. 1968); *Dodd v. Barnes*, 279 F.Supp. 291, 292-94 (E.D. Tenn. 1967); *Woodard v. Carteret County, North Carolina*, 252 F.Supp. 268, 270 (E.D.N.C. 1966); *Baker v. Carr*, 247 F.Supp. 629, 638-39 (M.D. Tenn. 1965). The Fifth Circuit has expressly stated that "[a]n alleged denial of voting rights does not, in itself, constitute a 'special circumstance' which automatically precludes federal court abstention." *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981).

Voting rights cases may raise special election timing considerations that influence the abstention decision. But both the district court and the Ninth Circuit at every stage of these proceedings took proper account of these concerns. *See* App. Cert. Pet. at 3a, 5a, 15a, 31a-34a.

1981), Cert. Pet. at 15, the court discussed abstention, but, as we note *supra*, petitioners completely mischaracterize this case and it, in fact, supports application of the abstention doctrine in the appropriate reapportionment context. *See* 661 F.2d at 1136. Finally, although the complaint in *Bandemer v. Davis*, Nos. IP 82-56-C, IP 82-164-C (S.D.Ind. Dec. 13, 1984), *app. pndg.* No. 85-1244, apparently raised state law issues, the district court's denial of abstention without discussion did not create a conflict among the circuits that would justify this Court's intervention.

CONCLUSION

The district court did not abuse its discretion. There is no conflict among the circuits. The Petition for Writ of Certiorari should be denied.

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